

Editor's note: 85 I.D. 154; overruled to the extent inconsistent with David Provinse 89 IBLA 154
(Oct. 4, 1985)

DAVID A. PROVINSE

IBLA 78-25

Decided May 26, 1978

Appeal from a decision of the Montana State Office, Bureau of Land Management, dated September 2, 1977, rejecting oil and gas lease offers covering unsurveyed lands located in navigable portions of the Yellowstone River. M 37867, M 37868.

Vacated and remanded.

1. Accretion -- Oil and Gas Leases: Lands Subject to -- Patents of Public Lands: Reservations -- Public Lands: Leases and Permits -- Public Lands: Riparian Rights

Unsurveyed fast lands, formed by accretion to public land or to lands patented with an oil and gas reservation, riparian to a navigable river and lying within the meander lines of that navigable river, as recorded on the official plat, may be leased provided that a proper offer is received and the other relevant conditions precedent to leasing are met.

35 IBLA 221

2. Accretion -- Avulsion -- Oil and Gas Leases: Lands Subject to -- Patents of Public Lands: Reservations -- Public Lands: Jurisdiction Over -- Public Lands: Riparian Rights

Federal law determines the legal characterization of accretions, avulsions, and relictions to land riparian to navigable bodies of water, where title to the land or reserved interests in the land remains in the United States.

3. Public Lands: Riparian Rights

Federal law follows the common law in distinguishing between accretion and avulsion. Accretion is the gradual and imperceptible addition of land to adjacent riparian land. Title to accreted lands inures to the uplands owner. Avulsion is the sudden perceptible shifting of the course of a river or stream. In the case of avulsion, title to the avulsed land is not lost by its former owner nor does it accrue to the owner of what was formerly the opposite bank.

4. Oil and Gas Leases: Generally -- Oil and Gas Leases: Lands Subject to -- Public Lands: Leases and Permits

The boundary of an oil and gas lease covering lands riparian to a navigable river is the meander line indicated on the official plat of survey and not the waterline. Thus, lands accreted to the leased lands may be separately leased.

APPEARANCES: David A. Provinse, pro se.

OPINION BY ADMINISTRATIVE JUDGE RITVO

David A. Provinse appeals from a decision of the Montana State Office, Bureau of Land Management (BLM), dated September 2, 1977,

rejecting two oil and gas lease offers covering unsurveyed land riparian to the Yellowstone River. The offers describe by metes and bounds: (1) a 104.35-acre tract contiguous to lots 3, 4, and 5, sec. 29, and lot 1, sec. 30, T. 24 N., R. 60 E., principal meridian, Richland County, Montana, and (2) a 32.902-acre tract contiguous to lot 7, sec. 10, T. 22 N., R. 59 E., principal meridian, Richland County, Montana. Oil and gas leases M 17979 and M 34395 embrace the surveyed land to which the unsurveyed tracts are attached. Lots 3, 4, 5, sec. 29, and lot 1, sec. 30, have been patented with a reservation to the United States of oil and gas. Lot 7, sec. 10, is public land.

In its decision rejecting appellant's offers, BLM cites the following reasons:

First, according to the latest approved official survey, the accretion described in the offers does not exist; and therefore, a lease to any accretion would change the survey boundaries without official approval of the survey.

Second, according to the official survey plat, the land described in the offers is a portion of the bed of the Yellowstone River which is navigable and title to the riverbed passed to the State of Montana at the time the State entered the Union.

[Third], the water line is the boundary of upland bordering navigable waters and the limit of the United States' ownership of the upland. A lease to a lot bordering navigable waters would include all the land up to the water line. By the same rule, a lessee may

lose acreage bordering [sic] navigable waters because of erosion. 1/

Notice of Appeal was received October 6, 1977, and a statement of reasons received November 8, 1977.

Appellant accompanied his statement of reasons with evidence supporting his description of the unsurveyed tracts. Included are four aerial photographs of the land in question, two dated August 9, 1967, and two dated July 17, 1974, which appellant apparently obtained from the Cadastral Survey Section of BLM, and BLM surface-mineral management quads NE-32 (January 1975) and NE-24 (April 1975), also covering the area in question. A comparison of appellant's exhibits with the latest official surveys of the area indicates that the present course of the Yellowstone River deviates markedly from the meander lines recorded in 1884 and 1902, the dates of the official surveys. In general, the river has narrowed significantly and additional sinuosity has occurred. As a result, much of what now appears to be fast land lies within the official meander lines of the river.

1/ BLM goes on to say that unsurveyed lands should be leased only in "unusual or rare cases" but does not explain why. The decision whether to lease public lands is within the discretion of the Secretary of the interior. Udall v. Tallman, 380 U.S. 1 (1965); Harris R. Fender, 33 IBLA 216 (1977); Fred P. Blume, 28 IBLA 58 (1976). Circumstances, if such exist, which would render leasing unsurveyed lands in question contrary to the public interest would provide valid grounds for rejecting the offer. Since, however, BLM did not elaborate its objections, we will express no opinion with respect to the present case.

Appellant presents six conclusions of law to justify his contention that BLM erroneously rejected his lease offers:

1. Title to accretion to federal land riparian to * * * the navigable waters of a state is governed by Federal Law.
2. That the ownership of a meandered lot upon a navigable stream carries with it the ownership of the land up to the water line which includes title to any accreted lands.
3. That a federal oil and gas lease upon a lot bordering a navigable or non-navigable stream covers only the interest in the land up to the meander line.
4. That lands between the meander line and medial line and the water line as they relate to federally owned lots and mineral rights are unsurveyed lands and as such are subject to filing for oil and gas leases under the regulations.
5. That the Congress has tied the leasing of federal tracts in oil and gas exploration to an acreage base and as such the lease will cover only the exact tract described in said lease with rentals assessed on a per acre basis.
6. That when title to unsurveyed accreted lands can be determined, these lands are available for leasing when described by metes and bounds as set forth in the regulation.

Thus, concludes appellant, under Federal law, title to the oil and gas resources in the unsurveyed tracts belongs to the United States, and the tracts -- unencumbered by any previous leases -- are available for leasing.

We agree. BLM did not apply proper legal standards in judging whether unsurveyed Federal lands or lands with reserved oil and gas

within the meander lines of a navigable river should be made available for leasing. Furthermore, BLM incorrectly analyzed the rights of the Federal Government and the lessee of the riparian Federal land in the unsurveyed accreted lands. Accordingly, we vacate and remand BLM's decision.

[1] BLM improperly concluded that Federal oil and gas resources available for leasing could not legally exist within the meander lines of the Yellowstone River. Expert evaluation of appellant's aerial photographs may well show the physical existence of the land appellant has described in his offer. If BLM harbors any doubts as to the accuracy of appellant's description, the photographs should be examined and their significance evaluated. 2/

If unsurveyed lands do exist, the leasing of such lands, within the meander lines of the river, is not precluded simply because the lands are unsurveyed. Rather, 43 CFR 3101.1-3 and 3101.1-4 (1976) merely impose special requirements on lease offers for unsurveyed lands -- most notably that the lands be described by metes and bounds connected to an official corner of the public land surveys and that the offer describe any settlers on the land. These sections clearly control BLM's analysis that leasing unsurveyed lands would improperly

2/ Appellant might alternatively have submitted a valid private survey to establish the existence of these lands. Forest Oil Corporation, 15 IBLA 33 (1974), does not hold otherwise.

"change the survey boundaries." The cited sections would be superfluous were this the case. Indeed, 43 CFR 3101.1-4(e) provides that the description of lands in leases issued prior to the approval of protected surveys will be conformed to the surveys when they have been extended over the leased area. As no finding was made that appellants failed to meet the legal requirements for an offer to lease unsurveyed lands nor is there any allegation that leasing of such unsurveyed lands would be contrary to the public interest, it was error to reject the offer on the grounds that the land lay within the meander lines of the river and were thus unsurveyed.

[2] The question now arises whether the unsurveyed land or the oil and gas deposits within the meander lines of the Yellowstone River contiguous to public domain or to land patented with a reservation of the oil and gas are federally owned and whether they are covered by an existing lease. The issue is the same as to both situations because where the United States has patented lands subject to an oil and gas reservation, lands accreting to the patented lands are also subject to the reservation. See David W. Harper, 74 I.D. 141 (1967); Sam K. Viersen, Jr., 72 I.D. 251, 255-256 (1965).

To resolve the question of ownership we must first decide whether State or Federal law supplies the applicable rule of decision. Until recently, the answer clearly would be that questions concerning the extent of rights incident to Federal lands and resources riparian to navigable bodies of water were governed by Federal law. In State

Land Board v. Corvallis Sand and Gravel Company (Brennan, J., and Marshall, J., dissenting), 429 U.S. 363 (1977), however, the Supreme Court sharply limited the applicability of Federal law. Specifically, that case overruled Bonelli Cattle Company v. Arizona, 414 U.S. 313 (1973), and distinguished Hughes v. Washington, 389 U.S. 290 (1967), on which this Board has previously relied. Forest Oil Corporation, 15 IBLA 33, 37 (1974).

Our reading of Corvallis and the cases cited therein, however, convinces us that the applicable rule of decision in the present case remains Federal law. That is to say that Federal law determines the legal characterization of accretions, avulsions, and relictions, to land riparian to navigable bodies of water, title to which remains in the United States or in which the United States has retained the mineral rights.

The rationale of Corvallis is that under the "equal-footing doctrine" enunciated in Pollard's Lessee v. Hagan, 15 U.S. (3 How. 212) 391 (1844), title to the beds of navigable bodies of water indefeasibly vested in the States at the time of their admission to the Union. Thus, a State may not be divested of title to the bed in favor of an uplands owner by operation of Federal law, but may only divest itself of title through the operation of its own law. The Corvallis court states at 376:

* * * [D]etermination of the initial boundary between a riverbed, which the State acquired under the equal-footing doctrine, and riparian fast lands [is to be determined] * * * as a matter of federal law rather than state law. But that determination is solely for the purpose of fixing the boundaries of the riverbed acquired by the State at the time of its admission to the Union; thereafter the role of the equal-footing doctrine is ended, and the land is subject to the laws of the State.
* * *

The court, however, notes a possible exception to the rule in the case where title to the riparian land remains in the United States. Commenting on Bonelli the court explains at 371-72:

* * * The only other basis [than the equal-footing doctrine] for a colorable claim of federal right in Bonelli was that the Bonelli land had originally been patented to its predecessor by the United States, just as had most other land in the Western States. But that land had long been in private ownership and, hence, under the great weight of precedent from this Court, subject to the general body of state property law. Wilcox v. Jackson [13 U.S. (13 Pet. 498) 266 (1839)] at 517. Since the application of federal common law is required neither by the equal-footing doctrine nor by any other claim of federal right, we now believe that title to the Bonelli land should have been governed by Arizona law, and that the disputed ownership of the lands in the bed of the Willamette River in this case should be decided solely as a matter of Oregon law. [Footnote omitted.] [Emphasis added.]

The implication is that had the property remained in Federal ownership Federal law would have governed.

Examination of the court's reference to Wilcox v. Jackson supports this inference. At the cited page the Wilcox court states:

We hold the true principle to be this, that, whenever the question in any court, state or federal, is, whether a title to land, which had once been the property of the United States, has passed, that question must be resolved by the laws of the United States; but that, whenever, according to those laws, the title shall have passed, then that property, like all other property in the State, is subject to state legislation, so far as that legislation is consistent with the admission, that the title passed and vested according to the laws of the United States.

The question here is whether the riparian rights of the United States in its retained land or interests have passed in some way to the State.

The Wilcox principle may be extended to require Federal resolution where the question is to define the boundary between land title to which is in the United States and State land. To hold otherwise, as the court notes in the language immediately preceding that quoted, would usurp the Federal Government's constitutional authority to regulate the public domain by divesting the United States of title to its own land and reserved resources against its own laws, and would thus make State law paramount to Federal law. See, U.S. CONST. art. IV § 3, cl. 2 and art. VI, cl. 2. 3/

3/ The Board reached the same conclusion on Forest Oil Corporation, supra. See also, an extended discussion in State of Utah, 70 I.D. 27, 45-48 (1963). This point is crucial. If it were unclear whether Federal or Montana law controlled title to the contiguous lands, this uncertainty alone should justify rejecting appellant's lease offer. Montana, in McCafferty v. Young, 397 P.2d 96 (1964), had apparently departed from the common law definitions of accretion and avulsion. Where title to land is uncertain proper grounds exist for rejecting a lease offer. Forest Oil Corporation, supra; J. W. McTiernan, 11 IBLA 284 (1973); Georgette B. Lee, 10 IBLA 23 (1973).

[3] In order to characterize under Federal law the ownership of unsurveyed lands contiguous to the riparian Federal land, it is necessary to examine the mechanism by which the lands were added to the riparian lands. Federal law follows the common law in recognizing the distinction between accretion and avulsion. Accretion is the gradual and imperceptible addition of land to adjacent riparian land. Philadelphia Co. v. Stimson, 223 U.S. 605 (1912); Nebraska v. Iowa, 143 U.S. 359 (1892); Forest Oil Corporation, *supra*; Palo Verde Color of Title Claims, 72 I.D. 409 (1965). Title to accreted land inures to the upland owner. *Id.* Avulsion is the sudden perceptible shifting of the course of a stream or river. In the case of avulsion, title to avulsed land is not lost by its former owner nor does it accrue to the owner of what was formerly the opposite bank. *Id.* ^{4/}

Both BLM and appellant have concluded that the unsurveyed lands in question were built up as a result of accretion. We see no reason to disturb this determination. Thus, under Federal law, title to these lands vests in the United States as the owner of the uplands, as does the title to the oil and gas lands accreting to lands in which the United States has retained the oil and gas.

^{4/} Two additional terms complete the lexicon. Reliction, which is treated like accretion, is the addition to riparian lands caused by the withdrawal of a body of water. Erosion is the diminution of lands by a process corresponding to accretion.

BLM's final reason for rejecting appellant's lease offer was that the unsurveyed lands described by appellant's offer were already covered by the leases issued for the uplands. In other words, BLM asserts that the boundary of a Federal lease riparian to a navigable river is the waterline and not the meander line. Were this the case, BLM would be correct in rejecting the offer, since to the extent an offer to lease lands embraces lands presently under lease, the offer is properly rejected regardless of whether the lease is void, voidable, or valid. Forest Oil Corporation, *supra*; Frances M. Kanowsky, 10 IBLA 358 (1973); Bertil A. Granberg, 7 IBLA 162 (1972). We, however, hold that the lease extends only to the meander line and not the waterline.

We have not previously had occasion to consider this precise question. ^{5/} In Sam K. Viersen, Jr., *supra*, however, the Solicitor considered the analogous question of leases bordering nonnavigable rivers. See also, James L. Harden, 15 IBLA 187 (1974), which adopts Sam K. Viersen, Jr., *supra*. These cases hold that the common law of accretion and relictions does not apply to determine the boundaries of oil and gas leases bordering nonnavigable waters. Instead, the boundary of the lease is the meander line indicated by the official plat.

^{5/} The Acting Assistant Solicitor, however, apparently came to the conclusion we reached herein in his memorandum Leasing procedure in cases involving accretions to riparian public lands (July 9, 1954).

Two factors figured prominently in reaching this conclusion. First, an examination of the Mineral Leasing Act, 30 U.S.C. § 181 et seq. (1971), suggests that the intention of Congress that a lessee should receive only a specific acreage is so dominant that there is no room for the common law doctrine of riparian rights. For example, the acreage of an upland lot shown on a plat of survey is fixed and the rental due can be computed accurately and definitely. Sam K. Viersen, Jr., supra at 262. Second, in the case of a nonnavigable body of water, the United States not only owns the uplands but also the riverbed. For leasing purposes, therefore, the meander line is simply the dividing line between two tracts of land both owned by the United States and available for leasing. Since the presence of the nonnavigable body of water is of little practical significance to the lessee, there is no justification for arbitrarily varying the location of the tracts to conform to migration of the river. Id. at 262-263.

This second factor does not hold true for the case of leases bordering on navigable waters. As explained above, the title to the beds of navigable bodies of water vested in the States on their admission to the Union. The upland lessee does, therefore, suffer the possibility of having his leasehold diminished by erosion. Considerations of mutuality might suggest that the lessee should be permitted to enjoy expansion of his leasehold by accretion.

We think, however, that Congress' intention to limit the lessee to a specific acreage overrides this line of reasoning.

Considerations of mutuality do not present a compelling argument. The common law holds that a lessee, who enjoys peaceful possession under a landlord without title to the leased premises may not deny the landlord's title and is liable for rent. Bishop of Nesqually v. Gibbon, 158 U.S. 155 (1895); Rector v. Gibbon, 111 U.S. 276 (1884); Stott v. Rutherford, 92 U.S. 107 (1875); Richardson v. Van Dolah, 429 F.2d 912 (9th Cir. 1970). Thus, it is not offensive to the principles of equity that a lessee may choose to pay rentals on a leasehold, title to only a portion of which is in his lease, if he feels that the possession of such a leasehold would be advantageous to him. Furthermore, that one lessee may be deprived of the full number of acres he might have received, does not justify conferring a windfall on an entirely different lessee.

In sum, BLM's rejection of appellant's lease offer was based on inappropriate grounds. The record does not refute appellant's contention that the lands in question are unsurveyed Federal lands not subject to any existing lease. All else being regular, BLM should have accepted appellant's offer.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is vacated and remanded.

Martin Ritvo
Administrative Judge

We concur:

Joan B. Thompson
Administrative Judge

Joseph W. Goss
Administrative Judge

